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16 **IN THE UNITED STATES DISTRICT COURT**
17 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

18 DANIEL NICHOLAS, M.D.,)	
)	Case No.: 2:12-cv-04872-JAK-PJW
19 Plaintiff,)	
)	
20 v.)	
)	CLASS ACTION
21 CONSECO LIFE INSURANCE)	
22 COMPANY,)	
)	Hearing Date: July 30, 2012
23 Defendant.)	Hearing Time: 8:30 a.m.
)	

24 **PLAINTIFF'S MOTION TO CERTIFY A NATIONWIDE CLASS**
25 **FOR SETTLEMENT PURPOSES, APPOINT PLAINTIFF AS CLASS**
26 **REPRESENTATIVE, APPOINT LEAD COUNSEL FOR THE**
27 **CLASS, DIRECT AN ISSUANCE OF A NOTICE TO THE CLASS,**
28 **APPROVE A PRELIMINARY CLASS WIDE SETTLEMENT,**
ISSUE A PRELIMINARY INJUNCTION AND
SCHEDULE A FINAL FAIRNESS HEARING

1 Plaintiff Daniel B. Nicholas ("Plaintiff") moves the Court for the
2 entry of an Order (i) certifying a nationwide class for settlement purposes
3 only, (ii) appointing Plaintiff as the class representative, (iii) appointing
4 lead counsel for the class, (iv) directing the issuance of a notice to the
5 class, (v) preliminarily approving a class-wide settlement, (vi) issuing a
6 preliminary injunction, and (vii) scheduling a final fairness hearing
7 ("Preliminary Approval Order"). Defendant Conseco Life Insurance
8 Company ("Conseco") joins Plaintiff in seeking approval of the settlement.

9 Attached to this motion are the Declaration of John Yanchunis
10 (Exhibit A); the Supplemental Declaration of John Yanchunis (Exhibit B);
11 the Declaration of Robert R. Sparks (Exhibit C); the Supplemental
12 Declaration of Robert R. Sparks (Exhibit D); the Declaration of George C.
13 Pratt (Exhibit E); a copy of the parties' Stipulation of Settlement (the
14 "Stipulation") (Exhibit F) which provides, subject to this court's approval,
15 for the settlement of the claims of a nationwide class of policyholders, and
16 which includes a proposed class notice and an election form to accompany
17 the class notice; and a Proposed Order Preliminarily Approving Class
18 Action Settlement, Conditionally Certifying a Class and Granting Other
19 Relief (Exhibit G).

20 **I. Factual Background**

21 **A. Plaintiff's Complaint**

22 Plaintiff filed this action in early February 2012 as a putative class
23 action seeking from the outset to pursue claims on behalf of a nationwide
24 class of Conseco's policyholders. Plaintiff alleges that Conseco's
25 November 2011 implementation of cost of insurance ("COI") rate changes
26 (the "November 2011 COI rate scales") for a group of universal life
27 insurance policies, known as "ValuLife" and "ValuTerm" policies (the
28 "Policies") breached the terms of the contract. COI rates and charges in

1 universal life insurance policies are generally determined by the insurer
2 subject to the terms and conditions of the policy. These rates and charges
3 are not guaranteed, and can vary over time.

4 The Policies here state that COI rates “will be determined by
5 [Conseco] based on its expectation as to future mortality experience.” The
6 Complaint alleges, among other things, that Conseco breached the Policies
7 in implementing the November 2011 COI rate scales. Specifically, Plaintiff
8 alleges that the increases in the November 2011 COI rate scales were not
9 based on Conseco’s “expectation as to future mortality experience.” At the
10 same time, Conseco partially reinstated the per-unit expense charge on
11 one policy form, UNL-91. While the per-unit expense charge on this one
12 policy form was reinstated, it was nevertheless substantially below the
13 maximum charge allowed by the UNL-91 Policy form. Plaintiff seeks
14 monetary, declaratory and injunctive relief on behalf of Plaintiff,
15 individually, and a putative class of Policyowners. Plaintiff seeks
16 certification of a nationwide class of Policyowners under Fed. R. Civ. P.
17 23(b)(3). Conseco denies that it breached the Policies.

18 **B. The Parties’ Settlement Efforts**

19 Shortly after the Complaint was filed, the parties began exploring
20 resolution of Plaintiff’s claims on a class-wide basis. These discussions
21 were prompted by the parties’ desire to avoid the expense, uncertainties
22 and the burden of protracted litigation, and to put to rest any and all
23 claims that have been, or could have been, asserted against Conseco
24 arising out of the November 2011 COI rate scales.

25 In furtherance of these settlement discussions, the parties took a
26 number of steps. *First*, Plaintiff retained an expert consultant and
27 actuary, Dale Hyers, to review the information and documents Conseco
28

1 provided to Plaintiff and to give advice on the merits of the action and any
2 settlement proposals.

3 *Second*, for purposes of Plaintiff's conducting extensive informal
4 discovery, Conseco produced tens of thousands of pages of documents
5 relating to the November 2011 COI rate scales, as well as certain
6 documents relating to an earlier COI rate increase for the Policies,
7 including but not limited to the following:

- 8 (a) All documents Conseco produced and all deposition
9 transcripts and exhibits from *Yue v. Conseco Life*
10 *Insurance Company*, CV 11-9506 (AHM) ("*Yue II*");
11 (b) All documents Conseco produced to the plaintiff in *Yue*
12 *II* for purposes of settlement discussions in that action;
13 (c) All court filings in *Yue II* relating to the plaintiff's
14 motions in that action for a preliminary injunction and
15 for certification of a California class of plaintiffs, initially,
16 and later for certification of a nationwide class of
17 plaintiffs;
18 (d) All Ninth Circuit appellate briefs in an action
19 commenced against Conseco in 2008 in *Yue v. Conseco*
20 *Life Insurance Company*, CV 08-1506 (AHM) ("*Yue I*");
21 (e) After the parties signed a term sheet on March 28, 2012,
22 and before the parties could submit this letter to the
23 Court for approval, the court in *Yue II* certified a
24 California subclass of Policyholders, conditionally
25 certified a second California subclass of persons who
26 have surrendered their Policies since November 2011,
27 and enjoined Conseco from imposing the November
28 2011 COI rate scales on any member of the first

1 California subclass that would see a COI rate increase as
2 a result of those changes; and

3 (f) Additional information and documentation requested by
4 Plaintiff's counsel or their consultant.

5 *Third*, the parties jointly retained a mediator, George C. Pratt,
6 formerly a United States Circuit Court Judge for the Second Circuit and a
7 United States District Court Judge for the Eastern District of New York, to
8 mediate their settlement discussions.

9 *Fourth*, after these materials were reviewed and analyzed, the
10 parties conducted a number of negotiating sessions. The first session
11 consisted of a full day of negotiations in Chicago, Illinois on March 15,
12 2012, with Judge Pratt mediating. The second and third sessions occurred
13 in Miami, Florida, on March 22 and 23, 2012. The fourth session occurred
14 on March 28, 2012 in New York, again with Judge Pratt mediating. In
15 these sessions, the parties set forth and discussed their respective
16 positions on the merits of the putative class claims and the potential for a
17 settlement that would involve class-wide relief, as well as Consecro's
18 financial position. The parties exchanged offers and counteroffers and
19 negotiated the points of each vigorously.

20 Following this intense period of discovery, analysis, and negotiation,
21 the parties, by their counsel, entered into a term sheet setting forth the
22 provisions of a settlement on March 28, 2012 (the "term sheet"). Judge
23 Pratt, the mediator, also signed the term sheet. Following the execution of
24 the term sheet, the parties prepared and ultimately signed the Stipulation
25 and prepared the class notice and accompanying election form. A
26 declaration signed by Judge George Pratt is attached as Exhibit E.

27 In the Stipulation, the parties agreed to a settlement of this action
28 that would involve the certification, for settlement purposes only, of a

1 nationwide class of Policyowners, subject to the approval and
 2 determination of the Court as to the fairness, reasonableness and
 3 adequacy of the settlement, which, if approved, will result in final
 4 certification of the class and dismissal of the action with prejudice.

5 **II. The Key Terms of The Stipulation**

6 For the Court's convenience, we summarize below key terms of the
 7 Stipulation.

8 ***The Class Definition.*** All owners of flexible premium life
 9 insurance policies designated by forms UNL-90, UNL-91 and UNL-90-NJ,
 10 also known as "ValuLife" and "ValuTerm" universal life insurance policies,
 11 which were initially issued by Massachusetts General Life Insurance
 12 Company and Philadelphia Life Insurance Company (the "Policies" and
 13 "Policyowners"), whose Policies were in force as of October 15, 2011, and
 14 who received notice of the new COI rate changes in October 2011. The
 15 class does not include (A) Policyowners who exclude themselves from the
 16 class, (B) current directors and/or officers of Conseco, (C) Plaintiff's
 17 counsel and Conseco's counsel, or (D) your Honor.¹

18 ***The Settlement Benefits.*** The Stipulation memorializes the
 19 agreement of the parties and the terms of the proposed settlement. If
 20 approved by the Court, the proposed settlement will provide the following
 21 benefits, among others, to class members:

- 22 • The proposed settlement provides relief that, in the aggregate,
 23 has an estimated minimum present value of more than **\$43**
 24 ***million to \$45 million***, not including the costs of notice and
 25 attorneys' fees that Conseco has agreed to pay in addition to
 26 the settlement relief.

27
 28 ¹ The class definition is set forth in §III, p. 9 of the Stipulation (Exhibit F).

- 1 • Eight forms of settlement benefits are available to class
2 members, six of which are available to class members whose
3 Policies remain in force as of the time that this settlement is
4 finally approved, and two of which are available to class
5 members whose Policies have terminated before the date this
6 settlement is finally approved.
- 7 • The six forms of relief available to class members whose
8 Policies remain in force are the following: (1) a 15% reduction
9 in all of the COI rate increases included in the November 2011
10 COI rate scales (as compared to the pre-existing rate scales)
11 that are the subject of Plaintiff's Complaint (the "Reduced
12 Settlement COI rate scales"); (2) Consecos guaranty that,
13 unless directed otherwise by regulatory authorities, the
14 Reduced Settlement COI rate scales will not be increased, but
15 may decrease, for a period of five years (the "5-Year Guaranty
16 Period"); (3) Consecos guaranty that expense charges for
17 owners of policy form UNL-91 will not be increased, but may
18 decrease, for a period of five years (the "Partially Reinstated
19 Per Unit Expense Charge"); (4) the establishment of a dispute
20 resolution procedure with which Consecos would be required to
21 comply if it wished to increase COI rates in the future after the
22 5-Year Guaranty Period expires, or if it sought to increase the
23 per unit expense charges after the 5-Year Guaranty Period
24 expires, which includes a review of any such increase by this
25 Court; (5) Consecos permanent guaranty of a bonus interest
26 credit for those Policies that are currently receiving a bonus
27 interest credit that is neither permanent nor guaranteed (the
28 "Guaranteed Bonus Interest Credit Benefit"); and (6) the

option for class members to avail themselves of a reduced paid-up life insurance policy, the death benefit for which would be enhanced as a result of this settlement (the “Enhanced Reduced Paid-Up Policy Benefit”). The Enhanced Reduced Paid-Up Policy Benefit is an opportunity that is not available to Policyowners absent a settlement such as this.

- The two forms of relief available to class members with terminated Policies are the following: (1) an opportunity to reinstate their terminated Policies under terms that would place them in the same position as class members who obtained the benefits of this settlement by maintaining their Policies in force (the “Reinstatement Benefit”); and (2) a cash payment for those class members with terminated Policies who do not choose the Reinstatement Benefit.²

The Release. The Release provided in the Stipulation covers all claims, in law or equity, whether known or unknown or suspected or unsuspected, arising from the claims that are or could have been brought in Plaintiff’s Complaint, as well as the released conduct as defined in the Stipulation. The Release is set forth in §X of the Stipulation on pp. 28-31 (Exhibit F). The full terms of the release will be provided to proposed class members in the class notice.

The Proposed Order. The parties submit to the Court a Proposed Order, asking that the Court do the following, among other things: (1) define and preliminarily certify a class for settlement purposes and appoint Plaintiff as the class representative and the undersigned as class counsel; (2) find that the proposed settlement is sufficient to warrant a full

² The Settlement Benefits are explained in greater detail in the Stipulation, §IV, on pp. 9-20 (Exhibit F).

1 hearing and notice to the class; (3) schedule a fairness hearing on the
 2 proposed settlement; (4) except as to the continuing prosecution of claims
 3 on behalf of the subclasses identified in *Yue II*, enjoin class members from
 4 filing, commencing, prosecuting, intervening in or participating as a class
 5 member in any lawsuit or administrative action in any jurisdiction based
 6 on claims arising out of the claims that are the subject of this action; (5)
 7 except as to the continuing prosecution of claims on behalf of the
 8 subclasses identified in *Yue II*, enjoin all persons from filing, commencing
 9 or prosecuting a lawsuit if they do not timely exclude themselves from the
 10 class (or from commencing or prosecuting a lawsuit as a class action)
 11 relating to the claims that are the subject of this action and the released
 12 conduct; and (6) order that notice of the proposed settlement be provided
 13 to the class.

14 **III. The Court Has Subject Matter Jurisdiction**

15 This Court has subject matter jurisdiction over this action, including
 16 jurisdiction to preliminarily approve the proposed settlement and certify a
 17 class for settlement purposes, under 28 U.S.C. § 1332(a) and (d)(2).

18 **IV. The Court Should Certify a Settlement Class**

19 “It must not be overlooked that voluntary conciliation and
 20 settlement are the preferred means of dispute resolution. This is especially
 21 true in complex class action litigation” *Officers for Justice v. Civil Serv.*
 22 *Comm’n*, 688 F.2d 615, 625 (9th Cir.1982); see also *Armstrong v. Bd. of*
 23 *Sch. Dirs. of the City of Milwaukee*, 616 F.2d 305, 312-13 (7th Cir.
 24 1980)(“It is axiomatic that the federal courts look with great favor upon
 25 the voluntary resolution of litigation through settlement,” and “in the class
 26 action context in particular, there is an overriding public interest in favor
 27 of settlement.”) (Internal quotations and citations omitted), *overruled on*
 28 *other grounds by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998); *In re*

1 *AT&T Mobility Wireless Data Sers. Sales Litig.*, 270 F.R.D. 330, 345 (N.D.
 2 Ill. 2010) (“Federal courts naturally favor the settlement of class action
 3 litigation”) (citing *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996)). In so
 4 doing, the Court simply reviews the settlement to determine that it is not
 5 collusive and, “taken as a whole, is fair, reasonable and adequate to all
 6 concerned.” *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d at 625.
 7 The proposed settlement in this matter is fair, reasonable and adequate,
 8 and is in the best interests of the putative class and the public.

9 Strong judicial policy favors settlement of class actions. *Class*
 10 *Plaintiffs v. Seattle*, 955 F. 2d 1268, 1276 (9th Cir. 1992). Approval of class
 11 action settlements normally proceeds in two stages: preliminary approval
 12 followed by notice to the class, then final approval. *Manual for Complex*
 13 *Litigation* (“*Manual*”) §21.632 (Fourth)(2004). The preliminary approval
 14 stage only requires the Court to make a preliminary determination on the
 15 fairness, reasonableness, and adequacy of the settlement terms. *Id.* At the
 16 preliminary stage, the Court need only conduct a prima facie review of the
 17 relief and the notice provided by the Settlement Agreement to determine
 18 that notice should be sent to the settlement class members. *See Id.*
 19 Therefore, the Court’s review is “limited to the extent necessary to reach a
 20 reasoned judgment that the agreement is not the product of fraud or
 21 overreaching by, or collusion between, the negotiating parties, and that
 22 the settlement, taken as a whole, is fair, reasonable and adequate to all
 23 concerned.” *Officers for Justice v. Civil Serv. Comm’n*, *supra*, at 625;
 24 accord *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998).

25 The *Manual* summarizes the preliminary certification criteria as
 26 follows:

27 If the case is presented for both class certification and
 28 settlement approval, the certification hearing and preliminary

1 fairness evaluation can usually be combined. The judge should
2 make a preliminary determination that the proposed class
3 satisfies the criteria set out in Rule 23(a) and at least one of the
4 subsections of 23(b).

5 *Manual* § 21.632. The criteria represents a minimal threshold:

6 If the proposed settlement appears to be the product of serious,
7 informed, non-collusive negotiations, has no obvious
8 deficiencies, does not improperly grant preferential treatment
9 to class representatives or segments of the class, and falls
10 within the range of possible approval, then the court should
11 direct that the notice be given to the class members of a formal
12 fairness hearing.

13 *Young v. Polo Retail, LLC*, C-02-4546 VRW, 2006 WL 3050861 (N.D. Cal.
14 2006); see, e.g., *Satchell v. Federal Express Corp.*, Nos. C03-2659 SI, C
15 03-2878 SI, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007) (granting
16 preliminary approval after finding proposed settlement was non-collusive,
17 had no obvious defects and was within the range of possible settlement
18 approval). The proposed settlement before this Court's consideration
19 satisfies the requirements of Rule 23 for preliminary approval. It is the
20 product of serious, informed and non-collusive negotiations; has no
21 obvious defects; does not improperly grant preferential treatment to class
22 representatives or segments of the class; and is squarely within the range
23 of possible settlement approval.

24 **A. The Requirements Of Fed. R. Civ. P. 23(a) Are**
25 **Satisfied.**

26 This Court can and should issue an order certifying a settlement-
27 only class because the requirements of Fed. R. Civ. P. 23 are satisfied.
28 Rule 23 affords the district courts broad discretion to determine whether

1 certification of a class-action lawsuit is appropriate. See generally Fed. R.
2 Civ. P. 23(d); *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100, 101 S. Ct. 2193, 68
3 L.Ed.2d 693 (1981); see also *Butler v. Am. Cable & Tel., LLC*, No. 09 CV
4 5336, 2011 WL 4729789, at *4 (N.D. Ill. Oct. 6, 2011).

5 Under Rule 23(a), the certification of a class of plaintiffs requires a
6 showing of (a) numerosity, (b) commonality, (c) typicality and (d)
7 adequacy of representation. See generally, *Amchem Prods. Inc. v.*
8 *Windsor*, 521 U.S. 591, 620, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997); see
9 also *Am. Int'l Grp., Inc. v. ACE INA Holdings, Inc.*, Nos. 07 C 2898, 09 C
10 2026, 2011 WL 3290302, at *3 (N.D. Ill. July 26, 2011). A plaintiff seeking
11 certification of a settlement class must satisfy each requirement of Rule
12 23(a) and one subsection of Rule 23(b). See *Butler* at *4 (citation omitted).

13 Here, and for purposes of the settlement of this action only, the
14 parties have demonstrated that the requirements of Fed. R. Civ. P. 23(a)
15 are met. *First*, the proposed class as defined consists of persons who have
16 or had an ownership interest in over 45,000 Policies that Consecos
17 currently administers.³ The proposed class is ascertainable on the basis of
18 Consecos's records and other objective criteria, and proposed class
19 members are so numerous that it is impracticable to bring all of them
20 before the Court. As in this case, when class size reaches substantial
21 proportions, the impracticability requirement is usually satisfied by the
22 number in the class alone. The numerosity requirement in this case is not
23 disputed.

24 *Second*, Plaintiff has alleged numerous questions of fact and law
25 common to the class, including, among others, whether Consecos breached
26 the Policies between Consecos and class members and whether class
27

28 ³ Declaration of Robert R. Sparks, ¶ 7 (Exhibit C).

1 members are entitled to damages based on Conseco's alleged breach of the
2 Policies. It stands to reason that individual factual differences among
3 Class members will not preclude a finding of commonality. The
4 commonality test is readily met because the instant action challenges a
5 practice or policy that affects all putative class members, which arise from
6 the same course of conduct.

7 *Third*, Plaintiff, whose Policy is currently in force, is facing an
8 increase in COI rates because of the November 2011 COI rate scales and
9 alleges that Conseco breached the Policies. Plaintiff has alleged that he
10 and all other members of the proposed class were subject to the same
11 course of conduct. Therefore, Plaintiff's situation and his claims are
12 typical of the claims of the members of the proposed class.

13 *Fourth*, the parties agree, based on Dr. Nicholas's representations,
14 that he will fairly and adequately protect the interests of the proposed
15 class in that: (1) his interests and the nature of his claims are consistent
16 with those of members of the proposed class; (2) there appear to be no
17 conflicts between or among the named Plaintiff and proposed class
18 members; (3) he is capable of continuing to be an active participant in
19 both the prosecution of and the negotiations to settle this action; and (4)
20 he and the proposed class members are represented by qualified,
21 reputable counsel who are experienced in preparing and prosecuting large,
22 complicated class actions, particularly those involving the sort of
23 insurance practice and administration claims alleged in the Complaint.

24 Additionally, the adequacy of class counsel in this case is easily
25 satisfied as the Plaintiff and the class are represented by qualified and
26 experienced counsel. Because class counsel has sufficient experience and
27 zeal, as evidenced by their actions throughout this litigation and in
28 settlement negotiations, the adequacy requirement is satisfied.

B. The Requirements Of Fed. R. Civ. P. 23(b)(3) Are Satisfied.

Federal Rule of Civil Procedure 23(b)(3) requires that common questions of fact and law predominate over questions of fact and law affecting only individual members of the proposed class, that litigation of the class claim be manageable and that a resolution of the action by class treatment be superior to other available methods for a fair and efficient adjudication of the action. Where an action is being settled, rather than litigated, however, a court need not consider the manageability issues that might otherwise be presented by litigation of a nationwide class action. *Amchem Prods. v. Windsor*, 521 U.S. 591, 619 117 S. Ct. 2231, 2248 (1997); *see also Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 302-303 (3d Cir. 2011) (holding that potential variances in different states' laws would not defeat certification of a settlement-only class because trial management concerns were not implicated by a settlement-only class, as opposed to a litigated class); *Butler*, 2011 WL 4729789, at *4.

The court is to engage in a "pragmatic inquiry into whether there is a common nucleus of operative facts to each class member's claim". *Clark v. Bonded Adjustment Co.*, 204 F.R.D. 662, 666 (E.D. Wash. 2002). Furthermore, "[a] common question need only exist, not predominate, for the [commonality] requirement to be satisfied." *Orthopedic Bone Screw Prod. Liab. Lit.*, 176 F.R.D. 158, 174 (E.D. Pa 1997).

Here, for purposes of this settlement class only, the common questions of fact and law predominate over questions of fact and law affecting only individual members of the proposed class. Moreover, for purposes of this settlement only, a resolution of the action in the manner proposed by the Stipulation is superior to other available methods for a fair and efficient adjudication of this action. The proposed resolution of this action involves eight forms of relief for proposed class members, six of

1 which are for in force Policyowners and two of which are for Policyowners
2 whose Policies have terminated.

3 **V. Plaintiff's Counsel Should Be Appointed Class Counsel.**

4 "[A] court that certifies a class must appoint class counsel." Fed. R.
5 Civ. P. 23(g). Federal Rule of Civil Procedure 23(g) "requires the court to
6 consider: (1) the work counsel has done in identifying or investigating
7 potential claims in the action; (2) counsel's experience in handling class
8 actions, other complex litigation and the types of claims asserted in the
9 action; (3) counsel's knowledge of the applicable law; and (4) the
10 resources that counsel will commit to representing the class." *Butler*,
11 *supra*, at *8 (citing Fed. R. Civ. P. 23(g)(1)(A)); see also *In re Rubber*
12 *Chems. Antitrust Litig.*, 232 F.R.D. 346 (N.D. Ca. 2005).

13 The parties agree that the undersigned Plaintiff's counsel be
14 appointed counsel to represent the class. Plaintiff is represented by John
15 A. Yanchunis of Morgan & Morgan P.A. and Robert R. Sparks of Parry
16 Deering Futscher & Sparks, PSC. These counsel have reviewed tens of
17 thousands of pages of documents, retained an expert to evaluate potential
18 claims, have participated in extensive arms'-length settlement
19 negotiations related to the November 2011 COI rate scales and, in so
20 doing, have adequately identified and investigated the potential claims in
21 this action. Plaintiff's counsel, moreover, have extensive experience
22 handling class actions in cases such as this one and have knowledge of the
23 applicable law, as demonstrated by their bios attached hereto (Exhibit A
24 and Exhibit C). Moreover, Plaintiff's counsel has already committed and
25 will continue to commit resources to representing the class. *Cf. Butler*,
26 2011 WL 4729789, at *8. The requirements of Fed. R. Civ. P. 23(g) are,
27 therefore, satisfied.
28

VI. The Settlement Should Be Preliminarily Approved

The United States Supreme Court's opinion in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), confirms the propriety, and recognizes the necessity of settlement class certification in consumer cases, involving a single practice, identifiable class members, and relatively small, essentially identical, and objectively calculable economic damages. Noting that Federal Rule of Civil Procedure 23(b)(3) is aimed primarily at vindicating "the rights of groups of people who individually would be without effective strength to bring their opponent into court at all," the Supreme Court declared such cases the paradigm for class treatment:

The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. The class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

Amchem, 521 U.S. at 617 (emphasis added) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)); see also *Brown v. Brown*, 6 Wn. App. 249, 253, 492 P.2d 581 (1971) ("A primary function of the class suit is to provide a procedure for vindicating claims which, taken individually, are too small to justify individual legal action but which are of significant size and importance if taken as a group").

The proposed settlement class is precisely the type of settlement class envisioned by the *Amchem* rationale. The instant case seeks to aggregate individual claims that are too small to justify individual legal action. These claims justify the certification of a settlement class. See, e.g., *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998).

1 There is an “overriding public interest” in settling class actions.
 2 *Armstrong*, 616 F.2d at 313. Preliminary approval of a settlement is “the
 3 first step in a two-step process to determine whether a proposed Rule 23
 4 settlement is fair, adequate, reasonable, and not a product of collusion.”
 5 *Butler*, 2011 WL 4729789, at *9; *see also* David F. Herr, *Annotated*
 6 *Manual for Complex Litigation* § 21.632 (4th ed. updated 2011) The
 7 second step is a final fairness hearing, where ultimately, under the
 8 Seventh Circuit’s five-factor test, this court will be required to consider:
 9 “(1) the strength of plaintiffs’ case compared to the terms of the proposed
 10 settlement; (2) the likely complexity, length and expense of continued
 11 litigation; (3) the amount of opposition to settlement among affected
 12 parties; (4) the opinion of competent counsel; and (5) the stage of the
 13 proceedings and the amount of discovery completed.” *Am. Int’l Grp.*, 2011
 14 WL 3290302, at *5 (citing *Synfuel Techs., Inc. v. DHL Express (USA),*
 15 *Inc.*, 463 F.3d 646, 652 (7th Cir. 2006)). At the final fairness hearing, the
 16 “most important factor in evaluating the settlement . . . is the strength of
 17 the plaintiff’s case compared to the amount of the settlement offer.” *Am.*
 18 *Int’l Grp.*, 2011 WL 3290302, at *6 (citation omitted). “In evaluating the
 19 strength of the case, an important consideration is the various risks and
 20 costs that accompany continuation of the litigation.” *Id.* (citations and
 21 quotations omitted).

22 “At the preliminary approval stage, however, the court’s task is
 23 merely to determine whether the proposed settlement is within the range
 24 of possible approval, not to conduct a full-fledged inquiry into whether the
 25 settlement meets Rule 23(e)’s standards under *Synfuel*.” *Id.* at *6
 26 (quotations and citations omitted). Courts typically conduct “a more
 27 summary version” of the *Synfuel* five-factor analysis at the preliminary
 28 approval stage. *Id.* The purpose of the preliminary hearing and approval

1 is not to ultimately determine the fairness of the proposed settlement, but
 2 rather “to ascertain whether there is any reason to notify the class
 3 members of the proposed settlement and to proceed with a fairness
 4 hearing.” *Armstrong*, 616 F.2d at 314.

5 Here, ample reasons exist to notify the class members of the
 6 proposed settlement and proceed with a fairness hearing. *First*, the
 7 proposed settlement was the product of extensive arms’-length
 8 negotiations that resulted in substantial benefits for the proposed class.
 9 Three respected law firms negotiated the settlement following Plaintiff’s
 10 diligent investigation into the facts and extensive review of documents.⁴
 11 The settlement was negotiated over the course of four mediation sessions
 12 supervised by Judge Pratt, a well-respected retired Judge of the United
 13 States Court of Appeals for the Second Circuit.

14 *Second*, as discussed above, the settlement affords significant
 15 benefits to the class. The proposed settlement provides relief that, in the
 16 aggregate, has an estimated minimum present value of more than **\$43**
 17 **million to \$45 million**. Resolutions of lawsuits such as these often take
 18 years of litigation, and recovery is never certain. Likewise, given the
 19 technical nature of the dispute and consequent need for well-developed
 20 expert opinions, legal fees and related costs are likely to be significant.

21
 22 ⁴ “The lack of discovery prior to settlement . . . does not preclude a court
 23 from approving a settlement. Because counsel have conducted a
 24 significant amount of informal discovery and ‘dedicated a significant
 25 amount of time and resources to advancing the underlying lawsuits, this
 26 factor does not weigh against preliminary approval. Additionally, the
 27 focus of this litigation appears to be more on legal than factual issues, and
 28 there is no indication that formal discovery would have assisted the parties
 in devising the Proposed Settlement Agreement.” *In re AT&T Mobility
 Wireless Data Servs. Sales Litig.*, 270 F.R.D. at 350 (quotations and
 citations omitted).

1 Any trial is likely to be complex and expensive. What's more, Consecro has
2 agreed to waive its opposition to class certification and to pay the expenses
3 related to notifying the class, which are additional significant benefits to
4 the class. *In re AT&T Mobility Wireless Data Servs. Sales Litig.*, 270
5 F.R.D. at 348.

6 *Third*, if there is opposition to the proposed settlement, objectors
7 have the opportunity to come forward and ask the Court to consider those
8 objections after notice is distributed to the class. *Cf. Am. Int'l Grp.*, 2011
9 WL 3290302, at *7 ("At this point, the only way to gauge any additional
10 opposition is to solicit it by sending notice of the settlement to the class
11 and inviting its members to voice their opinions.")

12 *Fourth*, Judge Pratt's opinion that the proposed settlement is
13 reasonable and fair is entitled to deference. *See Id.* at *8. As set forth in
14 the Stipulation, Plaintiff's attorneys' fees will be modest, litigation
15 expenses have been minimized due to a prompt resolution of the action
16 and the court therefore has "no legitimate reason to doubt the integrity
17 and motives" of class counsel. *Id.* And, despite this case being in its early
18 stages, the case is unique in that Plaintiff and his expert have had a unique
19 opportunity to review massive amounts of discovery directly relevant to
20 this lawsuit, in the form of documentary evidence, expert reports,
21 declarations, deposition testimony and extensive briefing of the legal
22 issues. We have, moreover, demanded additional information, which has
23 been provided, and Consecro has agreed to provide additional confirmatory
24 discovery upon Plaintiff's request. Plaintiff has also consulted an expert
25 for purposes of analyzing the information provided to us. We have, in
26 other words, had more than ample opportunity to evaluate the merits of
27 any potential claims arising from the November 2011 COI rate scales.

1 “Whether a class action is certified for settlement or certified for
 2 trial, and later settled, the judge must determine that the terms are fair,
 3 adequate and reasonable.” *Manual*, § 21.61. The Court’s review of a
 4 proposed settlement concerns whether the settlement should be approved,
 5 disapproved, or whether conditions should be imposed thereon. *Id.* To
 6 determine whether a settlement is fair, adequate and reasonable, the
 7 Court “must examine whether the interests of the class are better served
 8 by the settlement than by further litigation.” *Id.*

9 This Settlement Agreement meets these criteria. Absent from this
 10 Settlement are any of the “recurring potential abuses in class action
 11 litigation” which would make the benefits conferred by the Settlement
 12 illusory: this Settlement provides uniform relief to the Class Members for
 13 claims that would otherwise be too small to pursue individually. The
 14 Settlement provides relief in the form of monetary payments available to
 15 all Class Members. Significantly, this monetary benefit will be made
 16 available to many Class Members who were otherwise unaware of their
 17 rights. The Settlement also allows those who would rather pursue their
 18 claim individually to opt out. The Settlement treats all Class Members
 19 similarly, and does not impose “strict eligibility conditions” or
 20 “cumbersome claims procedures” designed to disqualify otherwise eligible
 21 claims. See *Manual* at § 21.61.

22 **VII. The Parties’ Proposed Notice Complies With Due Process** 23 **And Fed. R. Civ. P. 23**

24 Due process and Federal Rule of Civil Procedure 23 require that
 25 notice be given in a form and manner that is the best practicable notice
 26 and is reasonably calculated, under the circumstances, to apprise
 27 proposed class members (1) of the pendency of this action, (2) of their
 28 right to exclude themselves from the proposed settlement, (3) that any

1 judgment, whether favorable or not, will include any class member who
2 does not request exclusion, and (4) that any class member who does not
3 request exclusion may object to the settlement and, if he or she desires,
4 enter an appearance either personally or through counsel. *See* Fed. R. Civ.
5 P. 23(c)(2)(B).

6 Here, the proposed class notice that we enclose clearly apprises
7 proposed class members of each of these requirements. Moreover, the
8 parties proposed plan of notice, set forth in §V of the Stipulation (Exhibit
9 F), is reasonably calculated, under the circumstances, to reach proposed
10 class members, particularly because Consecro sent notice to all proposed
11 class members as recently as October 2011, when it notified them of the
12 November 2011 COI rate scales, at a time when each proposed class
13 member owned an in-force Policy.

14 It is well settled that in order to protect the rights of absent class
15 members, the Court must provide the best notice practicable to class
16 members of a potential class action settlement. *See Phillips Petroleum Co.*
17 *v. Shutts*, 472 U.S. 797, 811-12, 70 S. Ct. 652, 94 L. Ed. 865 (1985); *Eisen*
18 *v. Carlisle & Jacquelin*, 417 U.S. 156, 174-175, 94 S. Ct. 2140, 40 L. Ed.2d
19 732 (1974); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306,
20 314, 70 S. Ct. 652, 94 L. Ed.2d 865 (1950). “Rule 23 . . . requires that
21 individual notice in [opt-out] actions be given to all class members ‘who
22 can be identified through reasonable efforts’ with others given the ‘best
23 notice practicable under the circumstances’ . . . Due process does not
24 require actual notice to parties who cannot reasonably be identified.”
25 *Eisen*, 417 U.S. at 175-76.

26 Given (a) the sufficiency of notice, (b) the fact that the proposed
27 settlement resulted from extensive arms'-length negotiations, mediated by
28 a former federal court of appeals judge, (c) was concluded only after

1 counsel for Plaintiff had engaged in extensive due diligence and had
2 retained and consulted an eminently qualified independent expert about
3 the issues raised by Plaintiff's claims, and (d) the proposed settlement
4 evidenced by the Stipulation satisfies the requirements of Fed. R. Civ. P.
5 23 for settlement purposes, the parties submit that certification of the
6 Class for settlement purposes is warranted and that notice should issue to
7 the proposed class for a full hearing on fairness, reasonableness and
8 adequacy of the settlement.

9 **VIII. The Court Should Grant the Requested Preliminary**
10 **Injunction**

11 The All Writs Act provides that federal courts "may issue all writs
12 necessary or appropriate in aid of their respective jurisdictions.". The
13 complexity of class actions and multi-district litigation cases on the verge
14 of completing a settlement require that district courts have the flexibility
15 to bring the cases to judgment, and thus injunctions of parallel litigation
16 such as the one requested here fall within the "in aid of jurisdiction"
17 umbrella of the All Writs Act. *See, e.g., In re Diet Drugs*, 282 F.3d 220,
18 236, 239 (3d Cir. 2002).

19 As set forth in the proposed Preliminary Approval Order, the parties
20 respectfully request that the Court enter a preliminary injunction in
21 connection with the proposed settlement as follows:

22 Except for the continued prosecution of *Yue II* on behalf of the
23 two subclasses identified in the *Yue II* Decision, all Class
24 Members who have not been timely excluded from the Class are
25 hereby enjoined from filing, commencing, prosecuting,
26 maintaining, intervening in, participating in (as Class Members
27 or otherwise) or receiving any benefits from any lawsuit,
28 administrative or regulatory proceeding, or order in any

1 jurisdiction based on or relating to the allegations and claims
2 set forth in the Complaint in this action, including the facts and
3 circumstances relating thereto, and/or the Released Conduct
4 (as that term is defined in the Stipulation) with respect to his or
5 her Policy; and, except for the continued prosecution of *Yue II*
6 on behalf of the two subclasses identified in the *Yue II* Decision,
7 all persons are hereby enjoined from filing, commencing,
8 prosecuting or maintaining a lawsuit as a class action (including
9 by seeking to amend a pending complaint to include class
10 allegations, or by seeking class certification in a pending action)
11 in any jurisdiction, on behalf of Class Members who do not
12 timely exclude themselves from the Class, if such other lawsuit
13 is based on or relates to the allegations and/or claims in the
14 Complaint in this action, including the facts and circumstances
15 relating thereto, and/or the Released Conduct (as that term is
16 defined in the Stipulation) with respect to his or her Policy. The
17 Court finds that issuance of this preliminary injunction is
18 necessary and appropriate in the aid of the Court's jurisdiction
19 over the action.⁵

20 The issuance of this preliminary injunction is necessary and
21 appropriate in aid of the Court's jurisdiction to effectuate class action
22 settlement approval, to ensure the integrity of the class, and to protect any
23 settlement fund. Injunctions are commonly granted under these
24 circumstances, under the authority of the All Writs Act, 28 U.S.C. §
25 1651(a). *See, e.g., Liles v. Del Campo*, 350 F.3d 742 (8th Cir. 2003)
26 (affirming district court's injunction of related litigation issued in
27

28 ⁵ Proposed Order at 15-16 (Exhibit G).

1 connection with preliminary approval of proposed settlement and
 2 conditional certification of settlement class); *Kaufman v. Am. Express*
 3 *Travel Related Servs. Co., Inc.*, 264 F.R.D. 438, 449 (N.D. Ill. 2009)
 4 (“There is ample authority supporting the court’s power to stay pending
 5 federal and state cases to effectuate class action settlement approval”),
 6 *modified on other grounds*, No. 07 C 1707, 2010 WL 3365921 (N.D. Ill.
 7 Aug. 19, 2010); *see also In re Mex. Money Transfer Litig.*, No. 98 C 2407,
 8 98 C 2408, 1999 WL 1011788, at *3-4 (N.D. Ill. Oct. 19, 1999). In fact, at
 9 least one court has granted such an injunction even where preliminary
 10 approval was denied pending amendments to the settlement agreement
 11 and notice procedures. *See Kaufman*, 264 F.R.D. at 449-450.

12 **IX. Conclusion**

13 We respectfully request that the Court grant the unopposed relief set
 14 forth in the proposed Preliminary Approval Order and propose that the
 15 Court schedule a conference to discuss these matters more fully.

16 Respectfully submitted,

17 John A. Yanchunis
 18 MORGAN & MORGAN

19 Robert R. Sparks
 20 PARRY DEERING FUTSCHER &
 21 SPARKS, PSC

22 By: /s/ John A. Yanchunis
 23 John A. Yanchunis

24 Dated June 7, 2012

25 Counsel for Plaintiff
 26 Daniel Nicholas, M.D.
 27
 28

CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2012, **Plaintiff's Motion To Certify A Nationwide Class For Settlement Purposes, Appoint Plaintiff As Class Representative, Appoint Lead Counsel For The Class, Direct An Issuance Of A Notice To The Class, Approve A Preliminary Class Wide Settlement, Issue A Preliminary Injunction And Schedule A Final Fairness Hearing with all attachments** was filed using the Court's CM/ECF system and the following counsel were served by United States mail:

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